No. 88-1042 (2)

Supreme Court, U.S.
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# In The
# Supreme Court Of The United States

OCTOBER TERM, 1988

**ANTONIO DEINDE FERNANDEZ,**
*Petitioner,*

v.

**BARBARA J. FERNANDEZ,**
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the Connecticut Supreme Court correctly hold that where there was a waiver of diplomatic immunity to dissolve a diplomat's marital status, the state trial court could also assume jurisdiction over real property located in that state pursuant to Connecticut General Statutes § 46b-81, Connecticut's equitable distribution law, and Article 31 1(a) of the Vienna Convention on Diplomatic Relations which provides an exception to diplomatic immunity for "real actions relating to private immovable property . . ."?

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## RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Barbara J. Fernandez, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Connecticut Supreme Court in this case.

## STATEMENT OF THE CASE

Barbara J. Fernandez is an American citizen and a long-time resident of the State of Connecticut. Antonio Deinde Fernandez is a citizen of Nigeria and an international businessman who admits to being one of the richest men in Africa. He

heads dozens of companies, and Mrs. Fernandez believes his net worth exceeds $75,000,000 (Pet. App. 4a).

Mr. and Mrs. Fernandez were married in the United States on May 1, 1961. They have three children, all of whom were born in the United States and are above the age of majority (Pet. App. 3a). In 1974, Mr. and Mrs. Fernandez purchased a home at 27 Oakley Lane in Greenwich, Connecticut. The property was held in the name of a Connecticut corporation, Santa Barbara Estates USA, Inc. Mrs. Fernandez was the corporation's president and principal shareholder at the time of the purchase (Pet. App. 4a). The parties occupied this home as husband and wife until Mr. Fernandez voluntarily left the marital home in late 1984 or early 1985 (Pet. App. 3a). The home was used exclusively as the family residence, and Mrs. Fernandez still resides at the home. Some time after Mr. Fernandez left the marital home, he acquired his claimed diplomatic status as Ambassador and Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique — this, despite the fact that he is apparently a Nigerian national (Pet. App. 3a).

In late 1986, without Mrs. Fernandez's knowledge or consent, Mr. Fernandez caused title to the family home to be transferred from Santa Barbara Estates USA, Inc. to his name individually (Pet. App. 4a, 20a). Shortly thereafter, by complaint dated January 8, 1987, Mrs. Fernandez brought this divorce action. She simultaneously placed an attachment on the 27 Oakley Lane property in order to secure her rights in that property and prevent its further alienation (Pet. App. 4a). In her complaint, Mrs. Fernandez requested, among other things, an assignment of all Mr. Fernandez's right, title and interest in the home located at 27 Oakley Lane (Pet. App. 3a).

Mr. Fernandez moved to dismiss the action, claiming diplomatic immunity by virtue of his asserted — though contested — status as Deputy Permanent Representative to the United Nations for the People's Republic of Mozambique. In support of his motion, Mr. Fernandez cited the Vienna

Convention on Diplomatic Relations, *opened for signature*, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (the "Vienna Convention"), claiming that it was applicable to him through the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11 (the "Headquarters Agreement") and the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a–e.

On September 14, 1987, and October 6, 1987, the trial court conducted hearings on Mr. Fernandez's motion. Although Mr. Fernandez had notice of these hearings, neither he nor a representative from the Mozambique Mission appeared to testify. By ruling dated October 13, 1987, the trial court denied the motion to dismiss. Two weeks later, on the last possible day, Mr. Fernandez sought, and was thereafter granted, certification to appeal the trial court's ruling to the Connecticut Supreme Court, pursuant to Connecticut's special interlocutory appeal statute, Connecticut General Statutes § 52-265a.

After Mr. Fernandez filed his appeal with the Connecticut Supreme Court, the People's Republic of Mozambique executed a waiver permitting the trial court "to enter an order dissolving the marital status" between the parties (Pet. App. 6a). Despite this waiver and the real property exception to immunity contained in the Vienna Convention, Mr. Fernandez persisted in his argument that his claimed status as a diplomatic agent prevented the Connecticut trial court from adjudicating the parties' respective interests in the marital home.

Not surprisingly, the Connecticut Supreme Court disagreed and held that the waiver and the Vienna Convention's exception to diplomatic immunity for any "real action relating to private immovable property" set forth in Article 31 permitted adjudication of Mrs. Fernandez's "claimed right of ownership of the real estate." (Pet. App. 12a). In doing so,

the court summarily rejected Mr. Fernandez's claim that the real property exception did not apply to this case because the case involved only the securing of a potential judgment through the attachment of unrelated real property. The court made clear that this case concerns "a direct right of ownership of the [property] itself" — the essence of the real property exception. (Pet. App. 13a). The court, therefore, remanded the case to the trial court for adjudication of the parties' respective interests in the marital home.

Again, on the last possible day for filing, Mr. Fernandez filed a Motion for Reargument and Clarification with the Connecticut Supreme Court. On September 20, 1988, that Motion was denied (Pet. App. 1a). Exactly ninety days later, Mr. Fernandez filed his Petition for a Writ of Certiorari.

## REASONS WHY THE WRIT SHOULD BE DENIED

### I. THE UNITED STATES SUPREME COURT SHOULD NOT HEAR THIS MATTER SIMPLY BECAUSE MR. FERNANDEZ CLAIMS TO BE AN AMBASSADOR.

Mr. Fernandez asserts that because this case "affects ambassadors" it has special significance and merits review by this Court (Pet. App. 12–13). Mr. Fernandez does not cite any authority for this rather remarkable proposition. Indeed, he acknowledges that this Court no longer has exclusive jurisdiction over cases involving ambassadors, but shares jurisdiction with state courts pursuant to 28 U.S.C. § 1251(b)(1). The legislative history to the Diplomatic Relations Act, which, in 1978, codified this change, explains:

> [T]here is no justification for continuing to vest original and exclusive jurisdiction in the Supreme Court in those instances where foreign ambassadors, members of diplomatic missions, or members of their families will be subject to suit in the courts of the United States under this bill. The Supreme Court should not be burdened with such litigation on its original docket.

S Rep. No. 958, 95th Cong., 2d Sess. 6 *reprinted in* 1978 U.S. Code Cong. & Admin. News 1935, 1946. As Professor Wright has noted, "[i]t is reassuring to know that the Supreme Court is no longer required to hear all actions against ambassadors." C Wright, *The Law of Federal Courts*, 773 (4th ed. 1983).

This case is precisely the type of case Congress sought to remove from this Court's overburdened docket. Although this case facially involves an individual claiming ambassadorial status, the underlying issues concern, almost exclusively, matters of particular importance to states and private individuals — dissolution of marital status and resolution of conflicting claims to real property located within the state's territory. As such, this case does not warrant review by this Court.

## II. THIS PETITION PRESENTS A CASE OF SIGNIFICANCE ONLY TO THE PARTIES.

### A. The Decision Of The Connecticut Supreme Court Turns On The Particular Facts Of This Case And Will Affect Few, If Any, Other Litigants.

In deciding whether to grant certiorari, this Court should consider whether the dispositive issue is dependent on its particular facts. If so, this Court should deny certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925). The issue presented, no matter how "intellectually interesting and solid," must be of significance to more than simply the particular litigants and must be "beyond the academic or the episodic" before this Court will consider granting certiorari. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). In other words, the issue must not only be a significant one, but its resolution must be important to more than the particular litigant.

The facts giving rise to this lawsuit are unique and unlikely to recur. Mrs. Fernandez is an American citizen seeking a dissolution of her marriage and a distribution of her and her husband's real property. At the time Mrs. Fernandez commenced this lawsuit, she and her husband had been married for over twenty-six years, had lived in the United States for their entire married life and had raised three children, all of whom were born in the United States. Mr. Fernandez did not "acquire" his diplomatic status until after he voluntarily departed the marital home in 1984 or 1985 — a home in which Mrs. Fernandez still resides.

This case is made more unique by the fact that the People's Republic of Mozambique issued a waiver of immunity to the Connecticut courts. As such, the Connecticut Supreme Court was not only required to analyze and construe the interplay of Mr. Fernandez's claim of diplomatic immunity, Connecticut's marital laws, and the unusual facts of this case, the

court was also faced with conducting a specific fact-based inquiry into the nature and scope of the waiver of immunity — an inquiry obviously unique to the specific facts of this case.

It is extremely unlikely that any future litigants or courts will ever be faced with the unique facts of this case; the Connecticut Supreme Court's decision — and this Court's review of that decision — will therefore not be of significance to anyone other than these parties.

### B. There Is No Conflict In The Lower Courts Regarding The Issues Involved In This Case.

A key factor supporting review on certiorari is a real conflict in interpretation in the lower courts concerning the issues involved in the case presented for review. Sup. Ct. R. 17.1 (1985); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). No such conflict exists here.

The issue presented in this case is whether the "real property exception" to diplomatic immunity contained in Article 31 of the Vienna Convention applies to an adjudication of the parties' interest in their marital home incident to a dissolution of their marriage. Not only did the Connecticut Supreme Court recognize that "this is a case of first impression" (Pet. App. 11a), but petitioner concedes that "[t]here are no published cases construing this exception" in any type of proceeding. (Pet. App. 14). Thus, not only is there no conflict regarding the real property exception in the dissolution context, there is no conflict of interpretation concerning the scope of the real property exception to the Vienna Convention in any context. Absent a conflict, this Court need not involve itself in this necessarily private controversy.

There is no unresolved or conflicting question of national or international importance presented by this petition. As such, this petition presents a case of significance only to the parties.

## III. THE DECISION OF THE CONNECTICUT SUPREME COURT DOES NOT WARRANT REVIEW BECAUSE IT IS A CORRECT DECISION.

### A. The Real Property Exception Contained In The Vienna Convention Applies To This Case.

Article 31 of the Vienna Convention sets forth an exception to diplomatic immunity for any "real action relating to private immovable property." In arriving at its decision that the real property exception applies to this case, the Connecticut Supreme Court properly analyzed the express terms of the real property exception. As such, further review of the court's decision is not necessary.

The Connecticut Supreme Court, citing to leading commentators on the Vienna Convention, recognized that "a real action is an action where ownership or possession of immovable property is claimed." The court found that the very object and purpose of the plaintiff's complaint, regardless of whether she seeks a dissolution of marriage, is a vindication of her claimed right of ownership of real estate located within the State of Connecticut (Pet. App. 12a–13a). The court thus concluded that this action fell within the real property exception.

The court found further support for its position in the negotiating history of the Vienna Convention. The court cited favorably the Department of State Instructions to the United States Delegation to the 1961 United Nations Conference in Vienna: "[S]ince actions respecting real property are usually *in rem* it cannot be argued that an action affecting real property held by a diplomatic agent for non-diplomatic purposes will interfere with the property performance of his diplomatic functions." (Pet. App. 11a). Though petitioner misstates this language and argues that only *in rem* actions are included within the real property exception, the word "usually" indicates that other actions were indeed contemplated. These instructions are far more instructive in the interpretation of

the Vienna Convention than the discussion of Maine law in *Lewien v. Cohen*, 432 A.2d 800 (Me. 1981), the principal authority upon which petitioner relies in support of his argument that the real property exception includes only *in rem* proceedings.

The Connecticut Supreme Court also properly analyzed the philosophy underlying the entire Vienna Convention. The court recognized that the Convention's purpose is to ensure the efficient performance of the functions of the diplomatic missions, not to benefit individuals (Pet. App. 13a). The court, while acknowledging that the "functional" approach to immunity is not an open invitation to disregard the doctrine of diplomatic immunity, recognized that the Convention has established limitations on the scope of immunity — such as the real property exception — in order to minimize abuse by individuals hiding behind their claimed diplomatic shields (Pet. App. 13a–14a).

Mr. Fernandez claims that adjudication of rights and interests to the real property in question would delve into his most personal affairs and would directly challenge the prestige and dignity of his claimed status as a diplomat. In fact, these matters would affect Mr. Fernandez as an individual, not as a diplomat. This case seeks to adjudicate Mrs. Fernandez's interest in her home which she had shared with her husband for over 10 years before their separation and his acquisition of claimed diplomatic status — a home where the parties have raised their children and Mrs. Fernandez still resides. Resolution of these issues will certainly have no effect on the efficient functioning of the Mozambique mission. Indeed, if the court had adopted Mr. Fernandez's position that he had complete immunity here, the court would have placed Mrs. Fernandez in a position of having no forum to adjudicate her rights, while conferring an unjust and unsupportable windfall on the petitioner. This is precisely the type of abuse the drafters of the Vienna Convention sought to avoid when providing for exceptions to immunity.

Petitioner also argues repeatedly that through adjudication of rights and interests in the marital home, Mrs. Fernandez will somehow be able to pursue an *in personam* divorce action which the Vienna Convention meant to proscribe. This is not true. The Connecticut Supreme Court held that the trial court does *not* have personal jurisdiction to decide issues concerning alimony, attorney's fees and distribution of defendant's property other than the marital residence which is located within the State of Connecticut, so long as the defendant maintains his diplomatic status. In fact, the Connecticut Supreme Court limited the trial court's jurisdiction to very narrow confines, and the petitioner cannot ignore the fact, that regardless of whether this action is a divorce action or any other kind of lawsuit, it involves a direct interest in real property that is located within the State of Connecticut.

### B. The Connecticut Supreme Court Did Not Improperly Expand The Waiver.

Mr. Fernandez argues that this case presents an important question as to the interpretation of a waiver of diplomatic immunity because the Connecticut Supreme Court ignored the limitations imposed by the waiver in this case. As an initial matter, this Court should not exercise its discretionary jurisdiction solely to "second-guess" the Connecticut Supreme Court regarding the scope of the waiver. More important, however, petitioner has misconstrued the court's decision. The Connecticut Supreme Court did not find that the waiver submitted by the People's Republic of Mozambique contained a provision allowing the trial court to adjudicate the parties' interest in real property. No such finding was necessary as Article 31 of the Vienna Convention already permits this. The court simply held that once the waiver regarding marital status was issued, Mrs. Fernandez's claim of ownership in the family residence could be heard (Pet. App. 12a).

Because the waiver permitted the parties to dissolve their marital status, Connecticut's equitable distribution statute, Connecticut General Statutes § 46b-81, can now be utilized to adjudicate the parties' respective interests in their marital residence. Even the State Department in its *amicus* brief submitted to the Connecticut Supreme Court in support of Mr. Fernandez's claim of immunity, acknowledged that the waiver would facilitate the application of the real property exception contained in the Vienna Convention to the parties' marital home: "Because the People's Republic of Mozambique has now waived Ambassador Fernandez's immunity with respect to the dissolution of the marriage, however, it may be necessary for the superior court on remand to consider the applicability of this exception to such real property as the parties may own . . . ." (Brief of *Amicus Curiae* at 5-6, n.3).

The Connecticut Supreme Court correctly construed the waiver; further review by this Court is not required.

## IV. THE STATE DEPARTMENT HAS NOT SOUGHT REVIEW OF THIS CASE.

The State Department, representing the interests of the United States Government in assuring that diplomats in this country are afforded the full protections of diplomatic immunity awarded under the Vienna Convention, was an active participant before the superior court and Connecticut Supreme Court. The State Department, however, has elected not to support petitioner before this Court, apparently satisfied that the Connecticut Supreme Court's decision correctly and appropriately balances the concerns of diplomatic immunity with the rights of injured third parties. The decision by the State Department not to request review of the Connecticut Supreme Court's decision is significant. If that court's decision has the "far-reaching" and "international" significance which petitioner claims it has, presumably the State Department would have made its views known to this Court. The State Department's silence, and apparent concurrence with the Connecticut Supreme Court's decision, is an additional reason why this case does not warrant review by this Court.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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